

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA**

UNITED STATES OF AMERICA,)	CASE NO. 8:07CR375
)	
Plaintiff,)	
)	
vs.)	TENTATIVE FINDINGS
)	
EDWIN GUEVARA-PINEDA,)	
)	
Defendant.)	

The Court has received the Revised Presentence Investigation Report (“PSR”) and the Defendant’s objections thereto (Filing No. 61). The government adopted the PSR (Filing No. 62). See Order on Sentencing Schedule, ¶ 6. The Court advises the parties that these Tentative Findings are issued with the understanding that, pursuant to *United States v. Booker*, 543 U.S. 220 (2005), the sentencing guidelines are advisory.

The Defendant objects to several paragraphs in the PSR. The objections are discussed below.

¶¶ 16, 18 and 27 - U.S.S.G. § 2K2.1(b)(4)(A) - Stolen Firearm

The Defendant objects to the underlying facts (¶¶ 16, 18) and the 2-level enhancement (¶ 27) pursuant to U.S.S.G. § 2K2.1(b)(4)(A) for a stolen firearm. The government bears the burden of proof by a preponderance of the evidence regarding whether the firearm was stolen. This issue will be heard at sentencing.

The Defendant's argument that the Defendant must have known that the firearm was stolen for the enhancement to apply is without merit. Commentary to § 2K2.1(b)(4)(A) provides that the enhancement applies "regardless of whether the defendant knew or had reason to believe that the firearm was stolen." U.S.S.G. § 2K2.1 cmt. n. 8(B).

¶ 40 - Prior Offense

The Defendant objects “to the facts as alleged in this paragraph in total.” (Filing No. 61.) The Court cannot address the objection without further details. If the Defendant objects to the fact of the conviction, the government bears the burden of proving the offense. If, however, the Defendant objects to the application of the sentencing guidelines, the Defendant bears the burden. The standard in either case is by a preponderance of the evidence. This issue will be heard at sentencing.

¶¶ 55-57 - Defendant’s Immigration Status

Paragraphs 55-57 detail information regarding the Defendant’s immigration status in the United States. The Defendant was found guilty after a jury trial of Counts III and IV, which both charged him with being an illegal alien in possession of a firearm. In the objection, the Defendant argues that “insufficient evidence was adduced at trial to support a finding beyond a reasonable doubt” that he is illegally in the United States. The Defendant may not relitigate an element of the offense at sentencing, and otherwise the information in ¶¶ 55-57 does not affect the sentencing guideline calculation. Therefore, the objections to ¶¶ 55-57 are denied.

IT IS ORDERED:

1. The Defendant’s Objections to the Presentence Investigation Report (Filing No. 61) are denied with respect to ¶¶ 55-57, and the knowledge issue raised with respect to ¶¶ 16, 18 and 27;
2. The Defendant’s objections to the stolen nature of the firearm raised with respect to ¶¶ 16, 18 and 27, as well as ¶ 40, will be heard at sentencing;

3. Otherwise the Court's tentative findings are that the Presentence Investigation Report is correct in all respects;

4. If **any** party wishes to challenge these tentative findings, the party shall immediately file in the court file and serve upon opposing counsel and the Court a motion challenging these tentative findings, supported by (a) such evidentiary materials as are required (giving due regard to the requirements of the local rules of practice respecting the submission of evidentiary materials), (b) a brief as to the law, and (c) if an evidentiary hearing is requested, a statement describing why an evidentiary hearing is necessary and an estimated length of time for the hearing;

5. Absent submission of the information required by paragraph 3 of this Order, my tentative findings may become final; and

6. Unless otherwise ordered, any motion challenging these tentative findings shall be resolved at sentencing.

DATED this 17th day of March, 2008.

BY THE COURT:

s/Laurie Smith Camp
United States District Judge